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4 **BEFORE THE SHORELINES HEARINGS BOARD**
5 **STATE OF WASHINGTON**

6 **NORTHWEST SEAFARMS, INC.**)
7) **SHB No. 89-76**
8 **Appellant,**)
9 **v.**)
10 **WHATCOM COUNTY and STATE OF**) **FINAL OPINION**
11 **WASHINGTON, DEPARTMENT OF**)
12 **ECOLOGY,**)
13 **Respondents.**)
14

15 This matter came on for hearing before the Shorelines Hearings
16 Board, William A. Harrison, Administrative Appeals Judge, presiding,
17 and Board Members Judith A. Bendor, Chair, Harold S. Zimmerman, Nancy
18 Burnett, Robert Schofield, and Robert Hughes.

19 Appearances were as follows:

20 1. Paul H. Reilly, Attorney at Law, for Northwest Seafarms, Inc.
21 2. Randall J. Watts, Chief Civil Deputy Prosecuting Attorney for
22 Whatcom County.

23 3. Department of Ecology did not appear.

24 The hearing was conducted at Bellingham on May 14, 15 and 16,
25 1990, and on May 18, 1990, in Lacey, Washington.

26 Gene Barker & Associates provided court reporting services.

1 Witnesses were sworn and testified. Exhibits were examined. The
2 Board viewed the site of the proposal with the parties.

3 I.

4 Whatcom County Counsel in final summation stated as follows:

5 First of all, I would like to start out, this
6 is very, it's a laser beam type, only one issue.
7 There is no question but that the applicant has
8 attempted to mitigate this permit every way that he
9 can. He complies with the EIS, he complies with
our conditional use permit application, he complies
with each one of the standards.[...] (Transcript at
p. 2.)

10 We get down to fishing, commercial fishing.
11 Now, you have two types of fishing. One, you have
12 a person out there exercising a state-regulated
13 privilege. That's your non-Indian fisherman. On
14 the other hand, you have an individual out there
15 exercising a Federally-protected property right.
And that is a tribal fisherman. Now, if, in fact,
you don't buy the supremacy argument, then there is
no way that you can cite a fish pen at a location
where the tribe activity sets their nets.[...] (Transcript at pp. 2-3.)

16 Since this site is as moderate as it is in its
17 attempt to be heavily mitigated as it interferes
18 with that right of access, the Muckleshoot case
19 would argue and would dictate that it cannot be
placed there. It must be located in a situation
within the area where there is no active fishing,
there is no active sets taking place.

20 Now, if this board disagrees with the case
21 then certainly this board grants the permit.[...] (Transcript at p. 5.)

22 II.

23 The Board has previously held that it does not have jurisdiction
24 over Indian treat rights issues. Tulalip Tribes and Franzen v. BCE
25 Development, et al., SHB Nos. 87-5 and 6 (Order Granting Motions; July
26

23, 1987); Tulalip Tribes v. City of Everett and Department of Ecology, SHB No. 87-33 (Order Granting Motion; January 8, 1988).

Consequently we do not decide the effect of treaty rights in this case.

In reviewing the proposal for consistency with the Whatcom County Shoreline Master Program, we believe it to be consistent with Section 6.3(2)(B) in that interference with commercial fishing will not become significant. The net pens would be located between Lummi Rocks to the southeast and a known snag to the southwest. Consequently, the pens are within a pocket seldom used by large vessels using either purse seine or gillnet gear. Moreover, there is no significant interference with the reef net fishery farther to the north. The tribal skiff fishery, using gillnets, concentrates its efforts away from the site at Point Roberts. Occasionally, but not often, a tribal skiff may come to the site as it might elsewhere on the outer coast of Lummi Island or on other beaches in the region. There is no significant interference with commercial fishing in these facts, as provided in the master program.

Insofar as wild fish stocks are concerned, there is no significant threat of disease from the net pen fish nor any significant threat from sedimentation caused by net pen fish. The proposal is suitable with regard to depth, water quality, flow and loading.

Insofar as aesthetics are concerned, the proposal is compatible

1 with upland uses. It intrudes little upon the water environment, and
2 is aesthetically consistent with the master program.

3 Since the treaty issue is the County's basis for denying the
4 permits, that decision should be reversed. Moreover, the permittee
5 does not oppose the 21 conditions provided in the staff report (A-B).
6 These are to be incorporated in the permits provided that the
7 termination of the permits in condition 21 would only occur in
8 compliance with the procedure specified in the Shoreline Management
9 Act.

ORDER

The denial by Whatcom County of the Shoreline Substantial Development and Conditional Use Permits is REVERSED. The matter is remanded to the County for action consistent with this opinion.

DONE at Lacey, Washington, this 6th day of August, 1990.

SHORELINES HEARINGS BOARD

[See Concurring Statement]

JUDITH A. BENDOR, Chair

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Nancy Burnett
NANCY BURNETT, Member

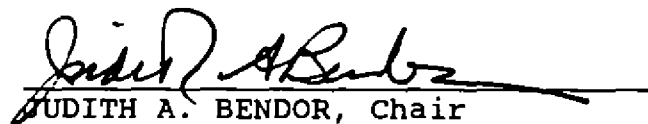
Robert Schofield [by RB]
ROBERT SCHOFIELD, Member

Robert Hughes [by RB]
ROBERT HUGHES, Member

William A. Harrison /by RB/
WILLIAM A. HARRISON
Administrative Appeals Judge

1 JUDITH A. BENDOR
2 CONCURRING STATEMENT

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4 I concur with the result. The Shoreline Hearings Board does not
5 have jurisdiction over Indian treaty rights issues. I share my
6 colleagues' statements about the permit conditions.
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9 JUDITH A. BENDOR, Chair

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27 CONCURRING STATEMENT
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